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No. 90-1352

In the Supreme Court of the United States

OCTOBER TERM, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS, (MABA), ET AL., APPELLANTS

v.

THE STATE OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court permissibly rejected the Attorney General's determination, in administering Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, that additional information materially supplemented a jurisdiction's submission of a voting change and thereby commenced anew the 60-day period during which the Attorney General may object to a voting change.

2. Whether a voting procedure was "in force or effect," within the meaning of Section 5 of the Voting Rights Act of 1965, on the date of coverage specified by the Voting Rights Act of 1965, if the procedure was enacted before the date of coverage but was not filled by general election until after the date of coverage.

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OPINION BELOW

The memorandum opinion and order of the three-judge district court (J.S. App. 1-40) is unpublished.[1]

JURISDICTION

The judgment of the three-judge district court was entered on January 25, 1991 (J.S. App. 93), and appellants filed a notice of appeal on February 7, 1991 (J.S. App. 95) and a jurisdictional statement on February 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

[1] The district court consolidated a Section 5 complaint by the United States and a Section 5 complaint by appellants, and the court issued a single decision and judgment covering both cases. J.S. App. 1, 41, 93.

STATEMENT

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, prohibits changes affecting voting in covered jurisdictions unless a change is precleared by either the United States District Court for the District of Columbia or the Attorney General of the United States. *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 33-34 (1978). More particularly, Section 5 bars covered jurisdictions from implementing any "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" different from that "in force or effect" on a specified date (November 1, 1964, November 1, 1968, or November 1, 1972, depending on the date of coverage for the particular jurisdiction) until the jurisdiction either (1) has submitted the proposed change to the District Court for the District of Columbia and received a declaratory judgment that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [Section 4(f)(2) of the Act]," or (2) has submitted the change to the Attorney General and the Attorney General "has not interposed an objection within sixty days after such submission, or * * * affirmatively indicated that such objection will not be made."

The Attorney General has promulgated regulations to govern his administration of Section 5. See 28 C.F.R. 51 *et seq.* Section 51.39 of these regulations provides that, if the submitting authority provides documents and written information "materially supplementing" a submission, "the 60-day period for the original submission will be calculated from the

receipt of the supplementary information." 28 C.F.R. 51.39.[2]

In 1975, Texas became a covered jurisdiction under Section 5 of the Voting Rights Act of 1965. It thus cannot implement any "standard, practice, or procedure with respect to voting" different from that in effect on November 1, 1972, until it has obtained preclearance. 40 Fed. Reg. 43,746 (1975).

2. a. In June 1989, the State of Texas enacted legislation creating 15 new elected state district court judgeships (Chapter 632, S.B. No. 1379 (1989)). On February 13, 1990, the State submitted the legislation (Chapter 632) to the Attorney General for review pursuant to Section 5.[3] The State's entire submission was a letter and a copy of Chapter 632. No information was submitted concerning the election method for district court judges or the way in which the judicial districts are structured. J.S. App. 47-56.

On March 23, 1990, during the pendency of the review process, state officials submitted by telefacsimile Sections 6, 7, and 7a of Article 5 of the Texas Constitution addressing—among other things—the method by which district court judgeships are apportioned, qualifications for judicial candidates, and the minimum geographic size of judicial districts. J.S.

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[2] The Attorney General has delegated his Section 5 preclearance authority to the Assistant Attorney General, Civil Rights Division. 28 C.F.R. 51.3. References in this brief to actions of the Attorney General include references to actions of the Assistant Attorney General, Civil Rights Division, acting on behalf of the Attorney General.

[3] The State's letter was dated February 8, 1990, and received on February 13, 1990. J.S. App. 47, 68, 74.

App. 59-67.[4] On April 11, 1990, prior to the expiration of the statutory 60-day review period, the Attorney General sent the State a letter informing officials that the "information received on March 23, 1990, is necessary for a proper review of the instant changes under Section 5," and that, pursuant to 28 C.F.R. 51.39, a preclearance determination would be made by May 22, 1990 (60 days from March 23, 1990). J.S. App. 68-69.

b. On May 16, 1990, six days before the expiration of the review period, the State sent the Attorney General a letter regarding its submission and certain court of appeals actions in *League of United Latin Am. Citizens Council No. 4434 (LULAC)* v. *Clements*, a Section 2 challenge to district judgeships in Texas. The letter observed that the *LULAC* panel decision (902 F.2d 293) had been issued five days previously,[5] and that the Fifth Circuit had ordered rehearing en banc (902 F.2d 322). The letter formally requested that the Attorney General "consider [the State's] submission in accordance with the Fifth Circuit's holding in *LULAC*, and in conjunction with the en banc opinion that will be issued." J.S. App. 70. Two days later, on May 18, 1990, the Attorney General sent the State a letter noting the State's request that "the information [it] provided on May 15 and May 16, 1990, supplement [its] submission" and confirming that the State "understand[s] that this will extend the time for review under Section 5."

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[4] These provisions of the Texas Constitution had been precleared by the Attorney General by letter dated October 1, 1985. J.S. App. 9.

[5] The *LULAC* panel decision rejected the Section 2 challenge on the ground that Section 2(b) does not apply to elected trial judges in Texas. 902 F.2d at 308.

Id. at 72.[6] The letter then related that, pursuant to 28 C.F.R. 51.39, as a result of the supplemental information, the Attorney General's preclearance determination would be made by July 16, 1990. J.S. App. 72-73.

On July 2, 1990, prior to the expiration of the second recalculated 60-day period, the State sent the Justice Department a letter advising that the State was withdrawing its submission of Chapter 632. The letter reiterated that, prior to the withdrawal, the sixtieth day for the Attorney General's preclearance decision was July 16, 1990. The State's letter explained that the submission was being withdrawn because the State was not certain whether the Fifth Circuit would issue the en banc decision in *LULAC* prior to July 16, 1990. J.S. App. 74-75.[7]

On July 16, 1990, the Justice Department sent a letter to the state officials informing them that it had received the letter withdrawing the submission, and that, as a result, no determination by the Attorney General was necessary. J.S. App. 76.

c. On October 1, 1990, three days after the en banc decision in *LULAC*, the State resubmitted the legislation for review under Section 5. J.S. App. 78-79.[8]

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[6] On May 15, 1990, the Attorney General received from the State a copy of the *LULAC* panel decision.

[7] The letter stated that the submission was being withdrawn pursuant to 28 C.F.R. 51.25. J.S. App. 74. This regulation provides that "[a] jurisdiction may withdraw a submission at any time prior to a final decision by the Attorney General."

[8] In *LULAC*, the en banc court held that the Section 2 results test does not apply to judges because they are not "representatives" within Section 2(b) of the Act. 914 F.2d 620, cert. granted *sub nom. Houston Lawyers Ass'n* v. *Attorney General of Texas* and *LULAC* v. *Attorney General of Texas*, Nos. 90-813 and 90-974, 111 S.Ct. 775 (1991) (to be

On November 5, 1990, the Attorney General interposed a Section 5 objection to the changes embodied in Chapter 632. J.S. App. 80-84. The objection letter stated that the method of election for the new judgeships would produce a discriminatory result proscribed under Section 2 of the Act. J.S. App. 82. The objection letter also stated that the State had not met its burden of proving the absence of discriminatory purpose in the submitted changes. *Id.* at 82-83; see also *id.* at 86. The letter noted that, in *LULAC*, the Fifth Circuit had held that "the Section 2 results standard is not applicable to judicial elections," but that the court had also held that Section 5 " 'applies to judicial elections' "; the letter concluded that "until this matter is clarified further by the courts we see no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2." J.S. App. 83. The letter thus advised the State that, unless and until it received a contrary declaratory judgment from the District Court for the District of Columbia or a reconsideration by the Attorney General, the proposed changes were "legally unenforceable and should not be implemented in the November 6, 1990 election." *Id.* at 83-84.[9]

d. Notwithstanding the Attorney General's objection, the State conducted elections on November 6, 1990, for all of the additional judgeships up for election, including five judgeships to which a Section 5 objection had been interposed. See J.S. App. 7 n.1.

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argued on April 22, 1991). The Section 5 issues in this case are distinct from the Section 2 issue in *LULAC*. See note 23, *infra*.

[9] On November 20, 1990, the Attorney General sent the State a letter clarifying that his objection was to nine of the 15 new judgeships (in Dallas, Lubbock, Tarrant, and Victoria Counties). J.S. App. 85-87.

3. On October 26, 1990—prior to the Attorney General's objection—appellants filed a Section 5 enforcement action against the State of Texas, seeking to enjoin elections in the judgeships created by Chapter 632 because they had not been precleared pursuant to Section 5. J.S. App. 3. Appellants also sought to enjoin elections in two judgeships in Travis County created by legislation in 1971 (but not filled by election until after November 1, 1972) that had not been precleared. *Id.* at 3, 5. The effective date of one of the judgeships (District 201) was after November 1, 1972, and the effective date of the other (District 200) was before November 1, 1972. *Id.* at 4.

On November 27, 1990, the United States also filed a Section 5 enforcement action against Texas, seeking to enjoin the State from continuing to implement the voting changes embodied in Chapter 632 that were the subject of the Attorney General's Section 5 objection. J.S. App. 3. The United States' complaint did not address the Travis County judgeships. The United States' suit and appellants' suit were subsequently consolidated. *Id.* at 41.

On November 30, 1990, the State filed its answer to the United States' complaint and asserted, among other things, that the judgeships created by Chapter 632 had been preclared by operation of law because the Attorney General had "failed to act within either sixty days of Texas's submission or sixty days of any material supplementary submission as described in 28 C.F.R. § 51.39." State Ans. 1-2. This filing, along with the State's response to appellants' complaint, marked the first time the State contended that its two additional submissions did not constitute information "materially supplementing" the initial submission within the meaning of 28 C.F.R. 51.39.

4. On December 26, 1990, the court issued its Memorandum Opinion and Order. J.S. App. 1. By a 2-1 vote, the court held that, contrary to the Attorney General's contemporaneous determinations and notice to the State, the State's submission of the Texas Constitution provisions and of the *LULAC* letter did not materially supplement the State's original submission, and thus did not permit re-calculation of the 60-day review period. *Id.* at 10. As a result and despite the State's own resubmission of Chapter 632 on October 1, 1990, the judgeships turned out to have been precleared by the Attorney General's failure to act within sixty days of the State's earlier submission —either on April 16, 1990 (sixty days after the initial submission) or, in the alternative, on May 22, 1990 (sixty days after the submission of the sections of the Texas Constitution). *Id.* at 12-13.

With respect to the sections of the Texas Constitution, the court stated that the information was not "supplemental" because it was readily available in a law library and because the Attorney General had precleared the transmitted sections. The court also held that the information was not material because, according to the court, it could not possibly have affected "the outcome" of the Attorney General's decision. J.S. App. 10-11.[10] With respect to the *LULAC* letter, the court stated that that information was

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[10] The court also held, with respect to the sections of the Texas Constitution, that the time could not have been extended pursuant to 28 C.F.R. 51.37(a), a provision governing the Attorney General's request for additional information. J.S. App. 11. The court stated that although it was unclear whether the Attorney General in fact requested the information, even if he did so, the regulation was not applicable because it states that the request shall be made "by letter," and in this case there was only a telephone call. *Ibid.*

neither supplemental nor material because the Justice Department was aware of the case and had participated in it. *Id.* at 11-12. The court also observed that the *LULAC* letter could not have been material because the Attorney General ultimately objected to Chapter 632 despite the en banc *LULAC* decision holding that Section 2 does not apply to the election of judges. J.S. App. 12-13.[11]

Judge Bunton dissented from the majority's holding that the Chapter 632 judgeships were precleared by operation of law. J.S. App. 17-40. He concluded that the additional materials extended the objection deadline, and he emphasized that the State had recognized in its correspondence that the deadline had been extended. *Id.* at 21-23, 33-35.[12]

THE QUESTIONS ARE SUBSTANTIAL

In our view, the Attorney General's determinations under 28 C.F.R. 51.39 that additional information materially supplements a submission, and thereby extends the time during which the Attorney General may object to the change, is not reviewable. We did not, however, explicitly argue non-reviewabil-

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[11] With respect to the Travis County judgeships challenged by appellants, the court held that, since the legislation creating the two judgeships was enacted prior to the date Texas became covered under the Voting Rights Act, the judgeships were not subject to Section 5 preclearance. J.S. App. 4-6. The court stated that "the date of enactment, rather than the dates of the first elections for the respective two courts, is the appropriate date by which to determine applicability of section 5." *Id.* at 6.

[12] Judge Bunton agreed with the majority that the Travis County judgeships did not require preclearance. J.S. App. 17, 29.

ity to the district court,[13] and for that reason have not filed our own Jurisdictional Statement. See *Air Courier Conf.* v. *American Postal Workers Union*, No. 89-1416 (Feb. 26, 1991), slip op. 5 & n.3.

Nevertheless, even assuming *arguendo* that the Attorney General's determinations are reviewable, the district court seriously erred. To the extent that the Attorney General's determinations are reviewable, they are entitled to substantial deference; the district court's failure to accord any deference to the determinations was a clear error warranting summary reversal and remand to the district court for further consideration. In the event of such a remand, we would present the non-reviewability issue to the district court, and we therefore discuss it here solely to ensure a full understanding of the issue presented.

1. A conclusion that the Attorney General's determinations under 28 C.F.R. 51.39 are not reviewable comports with the purposes and structure of Section 5 and with prior decisions of this Court. Furthermore, serious practical problems will result if the Attorney General's determinations in this context are reviewable.

a. As this Court has recognized, permitting a covered jurisdiction to submit a change to the Attorney General was intended "to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions," since litigation might "unduly delay the implementation of validly enacted, nondis-

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[13] The United States' only discussion of the "materially supplementing" issue was at the district court hearing, which was held approximately two weeks after the filing of the United States' complaint; that hearing also included extensive testimony by various judges, and much of the discussion focused on other issues, such as the appropriate remedy for the claimed Section 5 violation. See, *e.g.*, Tr. 62-144, 150-156.

criminatory state legislation." *Morris* v. *Gressette*, 432 U.S. 491, 503-504 (1977). At the same time, however, "[t]he judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." *Georgia* v. *United States*, 411 U.S. 526, 540 (1973).[14] As a result, this Court has recognized that "the purposes of the Act are furthered if, once *all* information relevant to a submission is placed before the Attorney General, the Attorney General is accorded the full 60-day period provided by law in which to make his 'difficult and complex' decision." *City of Rome* v. *United States*, 446 U.S. 156, 171 (1980). Otherwise, if additional information were received without adequate time for review, the Attorney General might be forced either to make a response based on an inadequate review of the submission or simply to object to it. See *Georgia* v. *United States*, 411 U.S. at 540-541.[15]

b. In view of the purposes of Section 5, and, more particularly, the alternative administrative preclearance process, this Court has held that the Attorney General's discretionary decisions in administering Section 5 are not reviewable. In *Morris* v. *Gressette*,

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[14] Indeed, many of the submissions the Attorney General receives are "bare bones," and do not comply with the required contents for a submission set forth in 28 C.F.R. 51.27.

[15] In *Georgia* v. *United States*, 411 U.S. at 539-541, this Court held that the 60-day period for review of submission may recommence upon the Attorney General's receipt of additional information that he requested; in *City of Rome*, 446 U.S. at 170-172, the Court held that the 60-day period for review of reconsideration requests, established by regulation, may recommence upon the receipt of additional information submitted by the jurisdiction.

supra, the Court held that the Attorney General's failure to object to a submission was not reviewable. 432 U.S. at 504-507. Although the Act does not expressly preclude judicial review, the Court concluded that non-reviewability can be inferred from the role of the Attorney General's preclearance procedure in the overall statutory structure. *Id.* at 501. The Court emphasized that the Attorney General's failure to object is not conclusive with respect to the validity of the submitted legislation, because the legislation can nevertheless be challenged in a private enforcement action, and that judicial review would necessarily extend what was intended to be an expeditious process. *Id.* at 504-506.

More generally, the Court explained that "[t]he nature of the § 5 remedy * * * strongly suggests that Congress did not intend the Attorney General's actions under that provision to be subject to judicial review." *Morris* v. *Gressette*, 432 U.S. at 501. See also *id.* at 507 n.24 ("[W]e think Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act."). Pursuant to *Morris* v. *Gressette*, lower courts have held that various discretionary decisions in the Attorney General's administration of Section 5 are not reviewable.[16]

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[16] See *Harris* v. *Bell*, 562 F.2d 772, 774 (D.C. Cir. 1977) (Attorney General's decision to withdraw a Section 5 objection is not reviewable); *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981) (Attorney General's decision to limit his objection to one annexation when four annexations were submitted as a "package" is not reviewable), aff'd mem., 456 U.S. 1002 (1982); *City of Rome* v. *United States*, 472 F. Supp. 221, 234 n.64 (D.D.C. 1979) (Attorney General's determination that he required additional time to consider supplemental information in a recon-

Since Congress has vested in the Attorney General discretion to object or preclear a voting change, it follows that the Attorney General also has discretion to determine what information he needs to make an assessment of the change. And, since authority to determine materiality and supplementation is directly derivative of the authority to preclear or object, decisions on materiality and supplementation should be equally unreviewable. Such a rule effectuates the twin goals of affording a submitting jurisdiction an informed and expeditious decision, *Morris* v. *Gressette*,

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sideration request is not reviewable), aff'd on other grounds, 446 U.S. 156 (1980); *City of Rome* v. *United States*, 450 F. Supp. 378, 381 (D.D.C. 1978) (Attorney General's decision not to use formal hearings in Section 5 determinations is not reviewable), aff'd on other grounds, 446 U.S. 156 (1980). See also *Leroy* v. *City of Houston*, 831 F.2d 576, 580 (5th Cir. 1987) (noting, in attorney's fees context, that "[a]dministrative pre-clearance activities [under Section 5] are excluded from direct judicial review because speedy, definitive oversight of local election procedures, required by the statute, could not be achieved by allowing judicial review"), cert. denied, 486 U.S. 1008 (1988). In the only decision directly addressing the Attorney General's determination that additional information materially supplemented a State's submission, the district court found it unnecessary to reach the reviewability issue because the court concluded that the information was a material supplementation. *Lucas* v. *Bolivar County*, 567 F. Supp. 433, 436-437 (N.D. Miss. 1983).

In *Briscoe* v. *Bell*, 432 U.S. 404 (1977), decided the same day as *Morris* v. *Gressette*, this Court held that the Attorney General's determination under Section 4(b) of the Act that a jurisdiction is covered by the Act is not reviewable. The Court primarily relied on the specific nonreviewability provision of Section 4(b), but also noted "[t]he significant part played by the discretionary authority of the Attorney General in administering the Act * * * underlined by *Morris* v. *Gressette*." 432 U.S. at 412.

supra, and ensuring that the Attorney General's decision is based on complete information, *Georgia* v. *United States*, *supra*. As this Court noted in *Morris* v. *Gressette*, 432 U.S. at 505 n.21, a submitting jurisdiction that is dissatisfied with the decision of the Attorney General may seek declaratory relief in the District Court for the District of Columbia; it may not, however, obtain judicial review of the Attorney General's discretionary determinations.[17]

c. If the courts were permitted to review the Attorney General's decision that information is supplemental and material, the administrative preclearance process would be seriously undermined. The Attorney General could never be certain (at least until it was too late) that he actually had the time he thought he had to review a submission. As a result, to ensure that a court could not later find that the submission was precleared by operation of law because the review period expired prior to the objection, the At-

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[17] This is not to say, of course, that all review of all Section 5 issues is precluded. Review is unavailable for the Attorney General's discretionary determinations within his statutory authority; review is available, however, for issues concerning statutory requirements and non-discretionary duties. Courts thus may appropriately review (1) whether the requirements of Section 5 have been met with respect to a particular change (*e.g.*, whether a change was subject to Section 5 and whether the change was precleared, see *McCain* v. *Lybrand*, 465 U.S. 236, 250 n.17 (1984)); (2) whether the Attorney General's actions are consistent with the statute (*e.g.*, whether his regulations comport with the statute, see *Georgia* v. *United States*, 411 U.S. at 536); and (3) whether the Attorney General has discharged a non-discretionary duty imposed by statute or regulation (*e.g.*, whether the Attorney General's request for additional information, suspending the 60-day review period until the submission of the information, was by letter, as required by 28 C.F.R. 51.37).

torney General might be compelled, in all but the clearest cases, to assume that the receipt of supplementary information did not extend the review period. This might force the Attorney General either to ignore the supplementary information in making his decision (*e.g.*, because he did not have the time to analyze it), or to object to the submission.[18] As noted, in analogous circumstances, the Court has recognized that "[s]uch a result would run counter to the purposes of the Act and regulations, since it would penalize submitting jurisdictions that have legitimate reasons to file supplemental materials" and "would mean that the Attorney General would, in some cases, be unable to give adequate consideration to materials submitted in piecemeal fashion." *City of Rome* v. *United States*, 446 U.S. at 171-172.

Finally, precluding judicial review of the Attorney General's decision that information materially supplements a submission (and thus extends the review period) does not permit the Attorney General to postpone endlessly the running of the 60-day review period, and thus does not implicate the concerns addressed in *Garcia* v. *Uvalde County*, 455 F. Supp. 101 (W.D. Tex. 1978), aff'd mem., 439 U.S. 1059 (1979). In that case, the district court held, in interpreting the Attorney General's regulations, that the Attorney General can suspend the running of the 60-day period only once by requesting additional information, in part because the Attorney General could otherwise "drag[] out" the review period. 455 F. Supp. at 104-106. If a submitting authority does not

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[18] Cf. 28 C.F.R. 51.52(c) ("An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.").

want to extend the time for the Attorney General's decision under 28 C.F.R. 51.39, however, it can refrain from submitting supplemental information (or make certain that its initial submission is complete). Thus, under 28 C.F.R. 51.39, the submitting authority, and not the Attorney General, has the ultimate control over whether the review process will be repeatedly extended.[19]

2. Even if the Attorney General's exercise of discretion under 28 C.F.R. 51.39 is reviewable, the discretionary determination is entitled to considerable deference, and the district court erred in failing to defer to the Attorney General's determinations.

a. If the issue is reviewable at all, a reviewing court should give great deference to the Attorney General's determination that information was material and supplementary to a submission. It is well established that an agency's interpretation of its own regulations must prevail unless it is "plainly erroneous or inconsistent with the regulation," [20] and this principle of deference is fully applicable to the

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[19] Indeed, judicial review of the Attorney General's determination under 28 C.F.R. 51.39 might permit a submitting authority to manipulate the Section 5 process in an unacceptable manner. For example, a jurisdiction could repeatedly supplement its original submission in an attempt to persuade the Attorney General to preclear the voting change. If the Attorney General objected, the jurisdiction could seek to overturn that objection by arguing that the supplemental information was not material to the submission and thus did not extend the time for the Attorney General's objection.

[20] *E.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). See also *Martin* v. *OSHRC*, No. 89-1541 (Mar. 20, 1991), slip op. 5; *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986).

Attorney General's interpretation of the Voting Rights Act regulations.[21] In stark contrast to this settled requirement, the district court did not even mention, much less apply, any obligation of deference. Instead, the district court essentially reviewed the Attorney General's determination de novo—a clear error.

In this particular context, moreover, there is even more reason than usual to give broad deference to the promulgating entity's interpretations of its regulations. Since the Attorney General ultimately determines, based on his review of the submitted information, whether to object to the submission, he is in the best position to know what information is material to *his determination* and whether new information is supplemental to the submission. The Attorney General's role in the administrative preclearance process thus further confirms the need for considerable deference to his conclusions about the materiality and supplementation of additional information.

b. Applying appropriate principles of deference, it is clear that the district court erroneously rejected the Attorney General's determinations.

First, the Attorney General reasonably concluded that the provisions of the Texas Constitution were material and supplemental to the State's submission. The State's submission sought preclearance of the creation of additional district court judgeships. The initial submission, however, did not contain information concerning the way in which the judicial districts are or can be structured under state law. This information—contained in the provisions of the Texas Constitution—was necessary to complete the Attor-

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[21] See, *e.g.*, *Blanding* v. *DuBose*, 454 U.S. 393, 401 (1982).

ney General's factual understanding of the judicial districting scheme. It was also necessary to his consideration of whether alternative methods of structuring the judicial districts were possible that might result in a less discriminatory effect on racial and ethnic minorities, and therefore whether the availability of such methods was probative of a discriminatory purpose.

The district court incorrectly rejected the Attorney General's determination. The court concluded that the provisions were not material because, in its view, "[t]here is no respect in which * * * [the information] possibly could have 'affected the outcome' of the submission." J.S. App. 10. As an initial matter, the Attorney General is in a far better position than the court to make that determination, and, as discussed above, the provisions might well have affected the outcome. But, in any event, the court misconstrued the nature of the materiality inquiry under this regulation. The materiality inquiry in this context focuses on the relationship of additional information to the Attorney General's analysis of the submission, not simply on its relationship to the end result or "outcome." In other words, the proper inquiry is whether the information aids the Attorney General's complete understanding of the submitted voting change and his determination whether the change has a discriminatory purpose or effect. The Attorney General may consider a wide range of information that completes his understanding of the submission, but that might not ultimately affect his preclearance decision. Thus, the district court not only improperly substituted its judgment for the Attorney General's, but also adopted an unduly narrow interpretation of the pertinent regulatory term.

With respect to supplementation, the district court concluded that the Texas Constitution provisions were not supplemental because they were readily accessible to the Attorney General and because the Attorney General had precleared the provisions five years previously. J.S. App. 10-11. In addition to the fact that, here, too, the Attorney General is in a far better position to evaluate supplementation than the district court, the district court's interpretation is incorrect. A submission is supplemented if a jurisdiction submits information that adds to the information the Attorney General received in the original submission (or in other supplementary submissions). Since the Attorney General receives thousands of Section 5 submissions each year,[22] it would be unreasonable simply to presume that the Attorney General has constructive knowledge of all information contained in previous submissions or in the Department of Justice law library, or that is otherwise available to the Attorney General. Moreover, it is clearly the submitting jurisdiction's burden to provide the Attorney General with complete information on which he can base a decision. See *Georgia* v. *United States*, 411 U.S. at 536-539. Finally, implicit in any supplemental submission is an argument that the material sent bears on the legality of the proposed changes; thus, even where the material may have already been available to the Attorney General, it will require additional analysis to evaluate the merits of the ar-

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[22] For example, in the years 1986-1990, the Attorney General had to review an average of over 17,000 changes encompassed in over 3,500 submissions each year under Section 5. Those numbers can be expected to increase in the next several years, as electoral changes are made in response to the 1990 census.

gument that the material supports the change's legality. Thus, on this issue as well, the district court had no basis for rejecting the Attorney General's conclusion.

Second, the Attorney General also reasonably determined that the State's letter formally requesting that he consider the submission in light of the panel decision and the anticipated en banc decision in *LULAC* also materially supplemented the State's submission. The district court held that the request was neither material nor supplemental because the Justice Department was well aware of the *LULAC* litigation. J.S. App. 11-12. But the court's conclusion misses the point. Voting rights litigation is frequently pending, and the Attorney General must make preclearance decisions despite that pendency. The significance of the State's letter was its formal request that the submission be considered, not simply with *LULAC* pending, but "in conjunction with the en banc opinion that will be issued." J.S. App. 70. This request was obviously supplemental because it added information to the submission. And the request was material because it added a significant element to the State's submission—a formal request, six days before the end of the 60-day review period, that the Attorney General consider the submission in light of an en banc opinion that had not been issued and for which the order of en banc review had been issued on that very day. See 902 F.2d 322 (5th Cir. 1990). Indeed, the en banc decision was so material to the State's submission that the State eventually withdrew the submission and did not re-submit it until after the en banc decision was issued. J.S. App. 74, 78.

The district court also suggested that the State's *LULAC* letter was not material because the Attorney

General ultimately objected to the submission after the decision. This suggestion is untenable. The determination that information is material is made when the information is received, not in retrospect after a final decision. Furthermore, a decision of materiality does not pre-ordain the Attorney General's ultimate preclearance decision. And, although a determination of materiality should not be limited to an analysis of the Attorney General's subsequent preclearance letter, the Attorney General clearly did give careful consideration to the *LULAC* decision in his preclearance objection. J.S. App. 83.[23]

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[23] Most of the judgeships at issue here are also at issue in *LULAC* (the judgeships in Dallas, Lubbock, and Tarrant Counties). The Section 5 issues in this case, however, are distinct from the Section 2 issue in *Houston Lawyers Ass'n*, No. 90-813, and *LULAC*, No. 90-975. The issue in those cases is whether the results test in Section 2(b) is inapplicable to district judgeships in Texas, either because judges are not "representatives" within the meaning of that term in Section 2(b) (as the en banc court held) or because the district judgeships are single person offices (as the court of appeals panel held). The term "representatives" does not appear in Section 5, and, as the en banc *LULAC* court recognized, judicial elections are within the scope of Section 5. 914 F.2d at 629. To be sure, if this Court agrees with the en banc *LULAC* court (or with the panel), it would clearly affect the basis for the Attorney General's results objection, but the proper vehicle for raising that issue would be a request for reconsideration pursuant to 28 C.F.R. 51.45 (or a declaratory judgment action), not a decision to ignore the Attorney General's Section 5 objection. Additionally, in this case, the Attorney General raised a purpose objection as well as a results objection (J.S. App. 82-83, 86), and the *Houston Lawyers Ass'n/ LULAC* cases concern only the results test.

We note that the district court criticized the Attorney General for, in its view, failing to heed the *LULAC* decision. J.S. App. 13-15. The Attorney General's action was entirely

3. Appellants also contend that the district court erred with respect to the applicability of Section 5 to the Travis County judgeships. J.S. 14-16. Although the United States did not challenge those judgeships in our complaint, we commented on the issue briefly at the district court hearing. We believe that one of the judgeships (District 201) was subject to Section 5 preclearance requirements because, although the legislation was enacted before November 1, 1972, the legislation expressly provided that its effective date was January 1, 1973. J.S. App. 4. Thus, it was not "in force or effect" on November 1, 1972 within the meaning of Section 5. See *Perkins* v. *Matthews*, 400 U.S. 379, 394 (1971) (Section 5's "reference to the procedure 'in force or effect on [the coverage date],' must be taken to mean the procedure that would have been followed if the election had been held on that date."); *City of Lockhart* v. *United States*, 460 U.S. 125, 132 (1983) (in determining whether a change must be precleared, the proper comparison is between the new system and the system "actually in effect" on the coverage date).[24] The other judgeship (District 200), however, was not subject to preclearance because its effective date was before November 1, 1972. J.S. App. 4. In other

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proper, however—the Attorney General was faced with a 60-day review period, imminent elections, and the strong likelihood of further appellate review of the *LULAC* holding, factors which counselled strongly against a failure to object (and preclearance of the change) based solely on the court of appeals' holding in *LULAC*. Furthermore, as noted above but not mentioned by the district court, the Attorney General's objection included a discriminatory purpose objection, a subject not at issue in *LULAC*.

[24] The district court did not consider the significance of the effective date; it considered only the date of enactment and

words, we believe that the appropriate date for determining Section 5 applicability is not the date of enactment (as the district court held, *id.* at 6) and not the date of election (as appellants contend) but rather the effective date for the particular offices at issue.[25]

CONCLUSION

With respect to the Chapter 632 judgeships, the judgment of the district court should be reversed and remanded for further proceedings. With respect to the Travis County judgeships, the judgment of the district court should be reversed with respect to District 201 and affirmed with respect to District 200.

Respectfully submitted.

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the date on which elections were held. It might therefore also be appropriate to remand to the district court for further consideration of this issue as well.

[25] The district court incorrectly stated that the United States and the Attorney General supported appellants on both judgeships. J.S. App. 3. See Tr. 158-159.

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